

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1270

In The
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,

Appellants,

No. 77-8174

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF NEW YORK

BRIEF OF APPELLANTS

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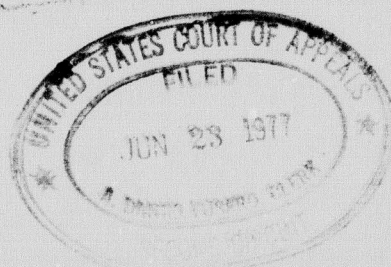


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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-8174

THE UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,

Appellants.

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

Anthony James Sebastian and Patrick Gibbons appeal from an Order of the United States District Court, Western District of New York, John T. Curtin, Ch.J., denying their motions to dismiss the superseding indictment herein, on the ground that to bring them to trial on this indictment is violative of their right not to be placed twice in jeopardy. The superseding indictment, which arises out of the same events charged in the original indictments, was brought after the original indictment was dismissed on motion of the government, which motion was made after a jury was selected and sworn in the trial of the first indictment.

The Order below is appealable under this Court's decision in United States v. Beckerman, 516 F. 2d 905 (2nd Cir. 1976), the reasoning and result of which were adopted by the Supreme Court in Abney v. United States, U.S. ,45 U.S.L.W. 4594 (June 9, 1977).

QUESTION PRESENTED

Whether a trial of these defendants on the superseding indictment is barred by the double jeopardy clause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, United States Constitution:

....nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb.

18 U.S.C. Section 472:

Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings in- to the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than \$5,000 or imprisoned not more than fifteen years, or both.

18 U.S.C. Section 495:

Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited-

Shall be fined not more than \$1,000 or imprisoned not more than ten years, or both.

STATEMENT OF FACTS

The original indictment in this case, filed June 21, 1973, charged, in two counts, that the Appellants did "pass and utter forged" United States Savings Bonds, in violation of 18 U.S.C. Section 472, and in one count, that they conspired, in violation of 18 U.S.C. Section 371, to violate those sections by uttering and passing 36 forged Savings Bonds. The events charged in the substantive counts were alleged to have taken place on May 26, 1972, and the conspiracy was alleged to have existed from May 4 to May 26, 1972.¹ (App. 12-14)

On May 4, 1976, the original indictment was reached for trial and a jury was chosen, empanelled and sworn on that day (App. 18-19). On May 7, 1976, when the Court, defendants, defense counsel and the previously sworn jury were ready to begin the taking of testimony, the Government moved to dismiss the indictment, stating that "under no theory of the government's proof could we prove that defendants violated these sections". (App. 26). The defendants, although joining in the motion to dismiss the indictment, reserved "all rights to move against any future indictment". (App. 28). The Court granted the Government's motion to dismiss.

¹ Count two of the 1973 indictment reads as follows:

That on or about the 26th day of May, 1972, in the Western District of New York, the defendants ANTHONY JAMES SEBASTIAN a/k/a/ TONY SEBASTIAN and PATRICK GIBBONS did knowingly and with intent to defraud pass and utter a forged obligation of the United States; to wit, United States Savings Bond, Series E, Serial Number Q2165871669E, face amount \$25.00, issue date May 1966; all in violation of Title 18, United States Code, Sections 472 and 2.

Count three is identical to count two except that a different serial number and issue date are alleged.

On June 24, 1976, the present superseding indictment was filed with the District Court. This indictment, in 36 counts, alleges that the defendants "did aid, abet, counsel, command and induce Dolores Dombrowski to forge the endorsement" on 36 specified United States Savings Bonds; and in count 37, charges a conspiracy, alleged to have existed on May 25 and May 26, 1972, to violate 18 U.S.C. Section 495 by forging the endorsements on the 36 United States Savings Bonds.²

As the District Court stated:

It is agreed by both the parties, and is evident from the two indictments, that the underlying facts of the charges alleged in each of the indictments are the same.(App. 4).

The defendants moved to dismiss the superseding indictment, on the ground that to require them to stand trial on the superseding indictment would place them twice in jeopardy for the same offense. On March 14, 1977, the District Court issued a Decision and Order denying those motions (App. 1-11). This appeal followed.³

² Count 1 of the superseding indictment reads as follows:

On or before the 26th day of May, 1972, in the Western District of New York, the defendants, ANTHONY JAMES SEBASTIAN and PATRICK GIBBONS, and Richard Ames, not named as a defendant, did aid, abet, counsel, command and induce Dolores Dombrowsky to forge the endorsement of Bernice Goulder on a United States Savings Bond bearing Serial Number Q1987602561E in the face amount of \$25.00, which bond was owned by Bernice Goulder, for the purpose of obtaining and receiving a sum of money from the United States and its agents; all in violation of Title 18, United States Code, Sections 495 and 2.

Counts 2 through 36 are identical to count 1, except that a different serial number and issue date are alleged, and some of the bonds are \$25.00, some \$50.00

³ The Court's opinion and order of March 14, 1977 also rejected Defendant's claim that they had been denied a speedy trial. This claim is not before the Court on this Appeal.

ARGUMENT OF LAW

POINT I

RETRIAL ON THE SUPERSEDING INDICTMENT
IS BARRED BY THE DOUBLE JEOPARDY CLAUSE

The purposes of the double jeopardy clause have been repeatedly characterized as follows:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. Green v. United States, 355 U.S. 184, 187-88 (1957); Abney v. United States, _____ U.S. _____, 45 U.S.L.W. 4594, 4596-97.; United States v. Dinitz, 424 U.S. 600, 606 (1976).

And again:

Society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal law. United States v. Jorn, 400 U.S. 470, 479 (1971), (Harlan, J.).

Here, the Government brought Anthony Sebastian and Patrick Gibbons to trial in May, 1976, almost four years after the crime alleged. After the swearing of the jury, and moments before testimony against them was to begin, the Government moved to dismiss the charges. The Government subsequently reindicted the defendants for the same events charged in the first indictment and now seeks to bring them to trial before another jury. Defendants respectfully

submit that this is precisely the sort of Governmental conduct proscribed by the double jeopardy clause,⁴ and that the superseding indictment should therefore be dismissed.

⁴ It is clear that the defendants in this case were placed "in jeopardy" within the meaning of the Fifth Amendment and that the double jeopardy clause is implicated. In Serfass v. United States, 420 U.S. 377, 388 (1975), the Court noted:

In the case of a jury trial, jeopardy attaches when the jury is empanelled and sworn. Downum v. United States, 372 U.S. 734 (1965), Illinois v. Sommerville, 410 U.S. 458 (1973).

Here, the jury was empanelled and sworn on May 4, 1976, and the Government moved to dismiss the indictment on May 7, 1976.

A

This case is controlled, appellants submit, by the long-settled and fundamental principle of double jeopardy jurisprudence that an acquittal or its equivalent, bars any further proceedings on the same charge. United States v. Ball, 163 U.S. 662 (1896); Fong Foo v. United States, 369 U.S. 141, 143 (1962).

Here, the "dismissal" of the first indictment was, in substance, an acquittal. As the Court put it in United States v. Martin Linen Supply Co., ____ U.S. ____, 45 U.S.L.W. 4337 (April 5, 1977):

In applying the teaching of Ball, Fong Foo, and like cases, we have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the Judge's action." United States v. Sisson, [399 U.S.267] at 270; cf. United States v. Wilson, [420 U.S.332] at 336. Rather, we must determine that the ruling of the Judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged. 45 U.S.L.W. at 4339.

In Martin Linen Supply Co., supra, it was clear that the trial court's judgment was based on an evaluation of the Government's evidence and a determination "that it was legally insufficient to sustain a conviction". 45 U.S.L.W. at 4339. On this basis, the Court held that the double jeopardy clause forbade further proceedings. In the present case, the fact that Judge Curtin was invited to dismiss the indictment by the Government does not distinguish this case from Martin Linen Supply Co., supra, as it is clear the Judge's ruling is based on the Government's concession of the inadequacy of its proof to the charges made:

Under no theory of the Government's proof could we prove that the defendant violated these sections. (App. 26).

The District Court's action on the first indictment herein was therefore an "acquittal" barring further proceedings on the charges contained in the first indictment.⁵

⁵ As will be argued below, in Subpoint E , the District Court erred in regarding the order of May 7, 1976 as "declaration of mistrial."

B

Against Defendant's double jeopardy claim, however, the Government argued below, and the District Court held, that the offenses charged in the two indictments were not the "same in fact and law", United States v. Pacelli 470 F.2d 67,72 (2nd Cir. 1972). (App. 4-5). To reach this conclusion, the Court applied the "same evidence" test derived from Morey v. Commonwealth, 108 Mass. 433, 434 and Blockburger v. United States, 284 U.S. 299 (1931): whether each charge required proof of an element not required for the other. (App. 4-5).⁶ See United States v. McCall, 489 F.2d 359 (2nd Cir. 1973); United States v. Nathan, 476 F.2d 456 (2nd Cir. 1973); United States v. Kramer, 289 F.2d 909, 913 (2nd Cir. 1961).

At least as to the conspiracy counts, the Court erred in the application of this test.

⁶ The usual formulation of the test is:

Offenses are not the same for purposes of the double jeopardy clause simply because they arise out of the same general course of criminal conduct; they are the "same" only when "the evidence required to support a conviction upon one of them [the indictments] would have been sufficient to warrant a conviction upon the other. United States v. Kramer, 289 F.2d 909,913 (2nd Cir. 1961).

In Blockburger, the Court stated:

the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. 284 U.S. at 304.

The conspiracy counts in both indictments charged that the defendants and others did "willfully combine, conspire and agree together" to commit certain offenses concerning 36 stolen United States Savings Bonds. The overt acts charged in both counts are the same. Although the dates of the alleged conspiracy have been trimmed in the second indictment to May 25-26, 1972 from May 4-26, it is clear that the same agreement in violation of 18 U.S.C. Sec. 371 is alleged in both counts. It is very well settled that "the essence of the conspiracy charge is an agreement". Pereira v. United States, 347 U.S. 1,11 (1954).

That the crime alleged to be the object of the conspiracy is stated to be in violation of 18 U.S.C. Sec. 495 in the second indictment, rather than Sec. 472, does not alter this analysis, because the conspiracy alleged is separate from the object crime.⁷

⁷ As the Court put it in Wong Tai v. United States, 273 U.S.77 (1927):

It is well settled that in an indictment for conspiring to commit an offense--in which the conspiracy is the gist of the crime--it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy...or to state such object with the detail which would be required in an indictment for committing the substantive offense. 273 U.S. at 81.

Similarly, in Braverman v. United States, 317 U.S. 49 (1942):

The gist of the crime of conspiracy as defined by the statute is the agreement or confederation of the conspirators to commit one or more unlawful acts...the allegation in a single count of a conspiracy to commit several crimes is not duplicitous, for "the conspiracy is the crime and that is one, however diverse its objects..."

As the gravamen of the crime of conspiracy is the agreement, and as a conspiracy and the object crime thereof are separate--sufficiently so to allow conviction for conspiracy when the object is never achieved, see e.g. United States v. Cioffi, 487 F.2d 492, 498 (2nd Cir.1973)-- it is clear that the crime charged in the two conspiracy counts have exactly the same factual basis: agreement to commit an "offense against the United States," 18 U.S.C. Sec. 371, which agreement concerned the same stolen bonds. No additional fact would be necessary to prove the conspiracy charge in one indictment that would not be necessary in the other, in that the conspiracy in both indictments dealt with committing an offense against the United States with the same bonds being the basis of those conspiracies. It is clear therefore that the two conspiracy counts are "same in fact and Law" and thus the "same offense", and barred even under the more limited view of double jeopardy protections inherent in the "same evidence" test.

Footnote continued:

A conspiracy is not the commission of the crime it contemplates, and neither violates nor "arises under" the statute.... whose violation is its object... Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal object, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. 317 U.S. at 53-54.

Here, the conspiracy count was sufficient, where it alleged an agreement, "however diverse to objects." In any event, as will be argued below in Subpoint C, this conspiracy count, alleging a conspiracy to "forge and utter" certain bonds, validly charged the crime the Government intended to prove.

C

Defendants submit that the substantive counts should be dismissed for the same reasons. The Government's insistence, and the Court's holding below, that the offenses charged in the second indictment are wholly separate offenses from those charged in the 1973 indictment, involve an aura of unreality. As the District Court noted, "the underlying facts of the charges alleged in both of the indictments are the same". (App. 4).⁸

The Court below concluded that proof of a non-genuine bond would have been necessary under 18 U.S.C. Section 472, the statute cited in the original indictment; and that proof of a genuine bond, with a falsely made endorsement, would be necessary under Section 495, cited in the second indictment. On this analysis, the two charges were not the "same in law and in fact". (App. 4-5).

Appellants here argue that the Court erred in focusing on the cited statutory sections rather than on the factual allegations of the indictment; that the Government could have proved the case it says it has under the first indictment (although not under 18 U.S.C. Section 472) and, had the jury found the Government's

⁸ This finding is supported by a comparison of the two indictments and also by the Government's concession in its July 15, 1976 response to defendants' discovery motion:

"This indictment....is based upon the same set of facts and circumstances that led to the original indictment...the 36 United States Savings Bonds in question are the same savings bonds, all of which were negotiated in the same transaction..." (Record, item 8 , page 1).

evidence satisfactory, had a valid conviction; that the first indictment is thus the "same in law and in fact" as the present indictment; and that the acquittal, although based on the Government's erroneous concession that its proof was inadequate to the original indictment, bars trial on the superseding indictment.

Concededly, what the Government will seek to prove here, concerning false endorsements on genuine bonds, does not violate Section 472. But it is well settled that, in determining whether an indictment charges an offense, the statute cited in the indictment is irrelevant, and the question is whether the allegations of the indictment violate any statutes of the United States.

Federal Rules of Criminal Procedure, Rule 7(c)(3); United States v. Hutcheson, 312 U.S. 219, 229. In United States v. Calabro, 467 F.2d 973, (2nd Cir. 1972), the Court said:

The fact that the wrong section of the statute was cited does not invalidate either the charge or the convictions if, as here, no prejudice is shown to derive from the miscitation. 467 F.2d at 981.

Thus the section number mentioned in the first indictment, Section 472, is not conclusive. Rather, the question is whether the allegations of the first indictment made out a violation of any statute, particularly Section 495.

The first indictment charged defendants with "uttering and passing forged" savings bonds, and conspiracy thereto. Defendants submit that this language is susceptible to a reading that encompasses the conduct of placing false endorsements on genuine bonds. Certainly the common use of the language would understand a "forged" bond to include bonds like those at issue herein, as

distinguished from "counterfeit" or non-genuine bonds. And it is not hard to infer that the Assistant United States Attorney who sought the 1973 indictment so understood the reference to forged bonds, as presumably did the Grand Jurors who saw (and perhaps handled) the bonds, heard testimony concerning the theft of bonds and the affixing of false signatures to them, and voted the indictment.

Numerous cases have clearly assumed that language referring to a "forged" bond, includes a genuine bond with a false endorsement. Misner v. United States (384 F.2d 130) (5th Cir. 1967) ("indicted, tried and convicted of forging and uttering" stolen genuine treasury check with false endorsement: conviction affirmed); United States v. Delgado 459 F. 2d 471 (2nd Cir. 1972) (conviction for uttering "forged" treasury checks where checks stolen and falsely endorsed), United States v. Robinson, 545 F.2d 301 (2nd Cir. 1976). (seven counts charged "negotiating forged treasury checks, knowing them to be forged," 549 F.2d at 305, where checks stolen and falsely endorsed) United States v. Rosenstein, 434 F.2d 640 (2nd Cir. 1970), ("forging of said check", referring to a valid check stolen from the mail).

Appellants respectfully submit that the common usage of the term "forgery" in opinions of this Court and in indictments drawn in this circuit, includes genuine instruments on which falsely

made endorsements have been placed.⁹

The original indictment herein was therefore a sufficient indictment, upon which defendants could have been tried for the acts the Government seeks to prove against them. A ruling to the contrary is, as this Court has put it, "over-technical," United States v. Calabro, *supra.*, 467 F.2d at 981, and contrary to the spirit of simplified modern pleading as expressed in Rule 7.¹⁰

United States v. Calabro, 467 F.2d 973 (2nd Cir.1972) is precisely on point and dispositive. There a multi-count indictment charged numerous defendants with conspiracy "to forge and utter and publish as true" certain savings bonds and postal money orders, in violation of 18 U.S.C. Section 495; and with various substantive counts of "forging and uttering" various specific instruments, in violation of 18 U.S.C. Section 495, 467 F.2d at 977, 977-98 n.1.

The testimony at trial showed:

"A large 'business' which forged and uttered stolen obligations; this indictment covers

⁹ Cf. United States v. Hood, 274 F.2d 874, 875 (7th Cir. 1960):

...he was charged with forging endorsements to genuine United States treasury checks, which, when so forged, became falsely forged and counterfeited certificates. (emphasis added)

¹⁰ The indictment "should be read as a whole and interpreted in a common sense manner." 8 Moore, Federal Practice, Paragraph 7.04, and passim.

transactions in postal money orders
and valid executed and blank unexecuted
Series E Savings Bonds. 467 F.2d at 978
(emphasis added)."

The court's review of the several transactions makes clear that the "forged" instruments were "stolen postal money orders," and "valid executed bonds stolen from the true owner" on which the defendants and their co-conspirators "forged the endorsements of the true owners when they cashed the bonds" 467 F.2d at 979. These latter transactions, in valid bonds with false endorsements, are indistinguishable from those the Government seeks to prove, and would have sought to prove on the original indictment, against appellants Sebastian and Gibbons.¹¹ Throughout the Calabro opinion, the Court refers (as did the indictments in that case and the original indictment in this case) to "forged" obligations, where what is clearly meant is genuine obligations with

¹¹ In the present case, the Government characterized what it sought to prove:

The savings bonds which are the subject matter of this indictment are in fact genuine obligations of the United States and what is forged is not the obligation but simply the endorsement of the owner or beneficiary on the reverse of the Savings Bond. (App. 26)

The court below summarized:

What the Government intended to prove was that the defendants had passed genuine United States Savings Bonds with forged payee signatures. (App. 2).

The Government's trial memorandum of May 4, 1976, setting forth what it intended to prove, is included as Item 11 of the Record.

falsely made endorsements.¹²

¹² The Court does state:

The conspiracy count...charged a conspiracy to forge and utter bonds and money orders, known to have been forged, with intent to defraud the United States. Read literally, this does not charge a conspiracy to forge endorsements. [Citation omitted]. However, the evidence showed a conspiracy to forge bonds themselves as well as to forge endorsements on valid bonds. Some of the bonds supplied by Calabro and cashed by the group were blank and had to be completed and stamped to have even counterfeit validity. Despite the genuineness of the blanks from which the defendants worked, this process is a forgery of the bonds in violation of 18 U.S.C. Section 471 which prohibits forging of any 'obligation or other security of the United States,' and their uttering constitutes a violation of 18 U.S.C. Section 472. [Citation omitted] Thus, a conspiracy to violate Sections 471 and 472 was charged, even if we take a possibly over-technical view and find that one under Section 495 was not, and the evidence sustained the charges. The fact that the wrong section of the Statute was cited does not invalidate either the charge or the conviction if, as here, no prejudice is shown to derive from the miscitation. 467 F.2d at 980-981.

This does not vitiate the argument stated in the text, as this paragraph, in terms, applies only to the conspiracy count. And it is merely an alternative ground (necessary only if the "over-technical view" is accepted that a conspiracy under Section 495 was not validly charged); if it applied to the substantive counts and if it were the sole basis for sustaining those counts, then some of the substantive counts concerning the "valid executed bonds stolen from the true owner", (467 F.2d at 979) would have had to be reversed; but all counts were affirmed. For example, Appellant Leonard Conforti was named in all the substantive counts in the indictment, and was convicted on all counts 467 F.2d at 978 n.1; all counts were affirmed. If a substantive count charging the "forging and uttering" of bonds were not validly proved by evidence of placing false endorsements on genuine bonds, some counts of Leonard Conforti's conviction would have had to be reversed. The Court's holding is clear, then, that an indictment (like the indictment of Sabastian and Gibbons) alleging transactions concerning "forged" instruments is sufficient for a valid conviction as evidence of falsely made endorsements of genuine, stolen bonds.

Similarly, in United States v. Campisi, 306 F.2d 318 (2nd Cir. 1962), this Court upheld convictions based on an indictment that charged "forging and uttering stolen" savings bonds 306 F.2d at 309 where:

The bonds that were the subject of the indictment were stolen from the homes and offices of a series of private persons. They were cashed between May 1960 and January 1961, mainly in banks located in small towns, by persons who posed as the registered owners...[who] would...go to a local bank, forge the endorsements and present the stolen bonds for payment. 306 F.2d 309-310 (emphasis added).

If the trial of May, 1976 had proceeded to verdict on the original indictment, and had the jury found for the Government, the Appellants here could have argued no prejudice by reason of the wording of that indictment. The defense knew that the Government would attempt to prove transactions concerning the placing of false endorsements on genuine, stolen savings bonds. The suppression hearing in this case concerned a written statement allegedly made by appellant Sebastian, describing the receipt of certain stolen bonds and the cashing of them by means of false endorsements and false identification; and certain items allegedly stolen at the same time as the bonds in this case. On the Government's appeal from the suppression of this evidence, this court described those items as follows:

The evidence consists of a written statement taken from Sebastian by a Government agent, and credit cards, checks and stock certificates allegedly stolen together with the bonds involved in this case and seized incident to Gibbon's arrest. United States v. Sebastian, 497 F.2d 1267, 1268 (2nd Cir. 1974).

This case is thus very like United States v. Hood, 274 F.2d 874 (7th Cir. 1960), where the defendant argued, in a prosecution under 18 U.S.C. Sec. 495, "that the indictment does not allege a forged endorsement to be a genuine writing of the United States." The Court responded:

The record before us clearly shows that defendant was at no time misled or prejudiced in any way by reason of the alleged repugnancy. We are left with no doubt that he fully understood the charge brought against him, on which he stood trial, and of which he was found guilty. The record indicates that he understood he was charged with forging endorsements to genuine United States Treasury checks, which, when so forged, became falsely forged and counterfeited certificates of the United States, and with knowingly uttering the same. 274 F.2d at 875.

United States v. Calabro, supra, and United States v. Campisi, thus make unmistakably clear that Judge Curtin erred in concluding that the Government's proof was insufficient to support the original indictment (although he reached this conclusion on the basis of the Government's erroneous concession, and could hardly have done anything other than grant the Government's motion for dismissal). That Judge Curtin and the Government were in error, however, does not allow the Government to correct its error and try again under a more artfully drawn indictment. As the Supreme Court has recently put it:

In Fong Foo v. United States [369 U.S. 141 (1962)], for example, a district court directed jury verdicts of acquittal and subsequently entered formal judgment of acquittal. The Court of Appeals entertained the Appeal of the United States and reversed the District Court's ruling on the ground that the trial judge was without power to direct acquittal under the circumstances disclosed by the record. We reversed, holding that, although the Court of Appeals may correctly have believed 'that the acquittal was based upon an egregiously erroneous foundation, ... nevertheless, 'the verdict of acquittal was final, and could not be reviewed...without putting [the defendants] twice in jeopardy, and therefore by violating the constitution'". United States v. Martin Linen Supply Co., supra, 45 U.S.L.W. at 4339.

See also United States v. Sisson, 399 U.S. 267, 289-900 (Government "takes the risks of all the mistakes of its prosecuting officers and of the trial judge".)

D

Even if the second indictment (or its substantive counts) were not barred on the above analysis, under the "same evidence" test of Pacelli, supra, and Kramer, supra, Appellants respectfully submit that retrial on these charges should be barred by double jeopardy; and that this is the case in which this Court should adopt the "same transaction" test for whether a later prosecution is for the "same offense", within the meaning of the constitution.

The "same evidence" test derives from Blockburger v. United States, supra, and Gore v. United States, 357 U.S. 386. Neither case was concerned with, nor ruled upon, the situation of consecutive prosecutions, but only consecutive sentences for offenses for which the defendant was convicted at one time.

But the question of whether a defendant can receive consecutive sentences for multiple convictions arising, in the same prosecution, for violation of multiple statutory sections in the transaction (the Blockburger question) is an entirely separate question from whether the Government may bring sequential prosecutions under those circumstances, as it has done in the instant indictment.

This important distinction was discussed by Justice Brennan in Abbate v. United States, 359 U.S. 187 (1959):

However, whatever the case under the Fourteenth Amendment as to successive state prosecutions, Hoag v. New Jersey (356 U.S. 464), or under the Fifth Amendment as to consecutive federal sentences imposed upon one trial, e.g. Gore v. United States (357 U.S. 386), I think it clear that successive Federal prosecutions of the same person based on the same act are prohibited by the Fifth Amendment even though brought under Federal statutes

requiring different evidence and protecting different Federal interests. It is true that this court has said: "Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304. But, so far as appears, neither this "same evidence" test or a "separate interest" test has been sanctioned by this Court under the Fifth Amendment except in cases in which consecutive sentences were imposed on conviction of several offenses at one trial. The accused, although punished separately and cumulatively for various aspects of a single transaction, is subject to only one prosecution and one trial. If the Government attempted multiple prosecutions for the same offenses, an entirely different constitutional issue would be presented...The basis of the Fifth Amendment is protection against double jeopardy in that a person shall not be harrassed by successive trials; that an accused shall not have to marshall the resources and energies necessary for his defense more than once for the same alleged criminal acts... Green v. United States, 355 U.S. 184, 187. In short, "the prohibition is not against being twice punished, but against being twice put in jeopardy..." United States v. Ball, 163 U.S. 662,669...In short, though the Court in Gore has found no violence to the guarantee against double jeopardy when the same acts are made to do service for several convictions at one trial, I think not mere violence to, but virtual extinction of, the guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute affecting a separate federal interest. 359 U.S. 197-199,201 (emphasis added).

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See also, Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring).¹³

Justice Brennan's reasoning in Abbate was followed by this Court in United States v. Sabella, 272 F.2d 206 (2d Cir.1957), where Judge Friendly wrote:

The District Court's decision...rested on what we deem an erroneous reading of Blockburger... Blockburger was a case, not of repeated indictment, but of a single multiple count indictment... The situation differs both historically and practically. The constitutional guarantee against double jeopardy stems from the ancient pleas of autrefois acquit and autrefois convict; these could not be made by a defendant to a multiple count indictment who had been neither acquitted nor convicted or any of the charges. And the far more serious practical consequences of trial on successive indictments for the same conduct are developed both in Gore and in Mr. Justice Brennan's separate opinion in Abbate, supra. 272 F.2d at 211-212.

This Court has not had, to counsel's knowledge, the opportunity to again consider the precise question: no case has come to the Court presenting sequential prosecutions on exactly the same events. Rather, the series of cases on double jeopardy

¹³ In rejecting the applicability of the "same transaction" test, Judge Curtin quoted from Abbate v. United States, supra and stated:

These comments are Justice Brennan's alone, and have not been joined in by a majority of the Court... although Justice Brennan's reading of the double jeopardy clause is persuasive, it has not yet been accepted as the law." (App. 6-17)

Although it is true the "same transaction" test has never been adopted by a majority of the Supreme Court, neither has a majority of that Court rejected that test. Justice Brennan's expression of opinion on this matter (joined by as many as two other members of the Court) have been concurring opinions in cases where the Court did not require such a broad ground of decision, or dissents from denials from certiorari. See United States v. Cioffi, 487 F.2d 492,497 n.5 (2d Cir. 1973).

in the Second Circuit have been cases where the crimes in question were rather clearly separate crimes, see, e.g., United States v. Pacelli, 470 F.2d 67,72 (2d Cir. 1972); United States v. Cala, 521 F.2d 605 (2d Cir. 1975), United States v. Nathan, 476 F.2d 456 (2d Cir.1973), often cases where the separate crimes at issue were conspiracy and the substantive crime conspired to. United States v. Frank, 520 F.2d 1287 (2d Cir. 1975); United States v. Kramer, 289 F.2d 909 (2d Cir. 1961); United States v. McCall, 489 F.2d 359 (2d Cir. 1973).

But those cases are not this case. Here, the Government's attempt is to have the defendants run the gantlet again on precisely the same evidence, and on precisely the same events on which the first jeopardy was founded--the only difference is that a separate statutory provision is referred to in the indictment, one seeking to vindicate exactly the same federal interests as the first: both statutes are designed to protect Federal securities from fraudulent practice.

The district court rejected the arguments presented in this subpoint, relying on United States v. Cioffi, 487 F.2d 492, 497-98 (2nd Cir. 1973) (App. 7). But in Cioffi, (as in the cases where Justice Brennan argues, in concurring, for the "same transaction" test) the court's holding neither adopts nor rejects that test as the issue was not presented by the facts of that case.

The issue would be precisely presented where exactly the same course of conduct was prosecuted sequentially, under separate statutes which make the same conduct criminal by reason of the presence or absence of additional aspects of the same transaction: e.g., if Blockburger had been prosecuted successively for sale of a quantity of drugs, for the same sale in the absence of the original stamped package, and for the same sale in the absence of a written purchase order. In this example, there is clearly a single, integrated transaction no part of which can be separated from--can occur separately from--the rest of the transaction. Cf. United States v. Sabella, supra. ^{13a}.

By contrast, as Judge Friendly notes in Cioffi, 487 F.2d at 498, a conspiracy and its objects are factually separate. The case thus is like United States v. Frank, supra. and United States v. Kramer, supra. The Court therefore did not have to decide the question whether the "same transaction" test, at least in the limited version of that test argued for here, should be applied. The question whether the double jeopardy clause is offended by successive prosecutions, under different statutes, for exactly the same event, such as the passing of bonds here, has thus not been foreclosed by United States v. Cioffi, supra.

Appellants respectfully urge, therefore, that the authority of United States v. Sabella, supra., remains unimpaired, and that this Court should now, following the reasoning of that case, adopt the "same

^{13a} Cf. Brown v. Ohio, 45 U.S.L.W. 4697, 4700 (June 16, 1977) (citing Braverman, supra.).

transaction" test. To hold otherwise, and to allow the Government to proceed in successive indictments for exactly the same events, as here,

would be to give altogether undue effect to what Mr. Justice Rutledge...termed "refinements"... so thin that, if they hold, the old and substantial protection against trial or conviction more than once for the same offense is but a shadow of its intended self.

United States v. Sabella, 272 F. 2d at 211.¹⁴

¹⁴ Numerous jurisdictions have adopted the "same transaction" test for double jeopardy claims, because it "provides the only meaningful protection against being placed twice in jeopardy." People v. White, 390 Mich. 245, 257-58, 212 N.W. 2d 222 (1973). For a partial catalog, see Crampton v. 54-A District Judge, --N.W. 2d --, 20 Cr.L.R. 2021 (Mich. Sup.Ct. 1976).

E.

The District Court held that Illinois v. Sommerville, 410 U.S. 458 (1973), controlled this case. In Sommerville, the prosecutor realized, after the empanelling and swearing of a jury, that the indictment was fatally deficient under Illinois law for its failure to allege an element of the crime. Such a defect was, under State law, not curable by amendment. The prosecutor moved for a mistrial, which was granted over defendant's objection. The Supreme Court upheld the conviction on retrial, over the argument that the double jeopardy clause barred a second trial.

Sommerville thus bears an obvious superficial similiarty to the instant case. Appellants respectfully submit that it is not controlling here, for two reasons.

First, Sommerville is not controlling because it deals with the standards, under the double jeopardy clause, to be applied in the case of a mistrial, not an acquittal as occurred here.

As noted above, page 8, the Supreme Court has stated that the test for whether a trial court's order is an acquittal, is:

whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements charged. United States v. Martin Linen Supply Co., 45 U.S.L.W. at 4339. 15

¹⁵ Strictly speaking, the question before the court in United States v. Martin Linen Supply Co., *supra.*, United States v. Wilson, 420 U.S. 332 (1975), United States v. Jenkins, 420 U.S. 358 (1975), and Serfass v. United States, 420 U.S. 377 (1975), was whether the Government was entitled to an appeal under the Criminal Appeals Act, 18 U.S.C. Sec. 3731, as amended in 1970. However, as that Act provides that appealability depends on finding that the double jeopardy clause does not prohibit further prosecution, see United States v. Wilson, 420 U.S. at 337 338-39, the holdings and language of those cases are directly relevant to the question whether the Government may institute further prosecution by other means as here, by reindictment on the same charges.

See also Lee v. United States U.S. , 45 U.S.L.W. 4661
(June 13, 1977):

Where a mid-trial dismissal is granted on the grounds, correct or not, that the defendants simply cannot be convicted of the offense charged, [United States v. Jenkins [420 U.S. 358] establishes that further prosecution is barred by the double jeopardy clause.

Here, the Government represented that it could not prove the charge it had laid in the indictment. Even though that representation was founded upon the erroneous notion that the indictment failed to charge a crime under Section 495, the basis of the order is clearly the supposed inability of the Government to prove the charge laid.

In Lee v. United States, supra., the court discussed the considerations governing resolution of the question whether an order "dismissing" a charge after a trial had begun was a "mistrial" governed by Illinois v. Sommerville, supra., and United States v. Dinitz, 424 U.S. 600 (1976), or a disposition (whether called a dismissal or acquittal) governed by United States v. Jenkins, 420 U.S. 358 (1975) and like cases. The court characterized its holding in Jenkins:

The issue before this Court was whether a government appeal from the District Court's order would violate the Double Jeopardy Clause. Because of the absence of any general finding of guilt, it was clear that if the Government prevailed on the merits of its appeal, further trial proceedings would be needed to resolve "factual issues going to the elements of the offense charged." Id., at 370. We held

that such proceedings would violate the double jeopardy guarantee: "The trial which could have resulted in a judgment of conviction, has long since terminated in respondent's favor." Ibid. In resting our decision on this ground, we recognized that it was "of critical importance" that the proceedings in the trial court had terminated "in the defendant's favor" rather than in a mistrial. Id., at 365 n. 7.

The distinction drawn by Jenkins does not turn on whether the District Court labels its action a "dismissal" or a "declaration of mistrial." The critical question is whether the order contemplates an end to all prosecution of the defendant for the offense charged. A mistrial ruling invariably rests on grounds consistent with reprosecution, see United States v. Jorn, 400 U.S. 470, 476 (1971) (plurality opinion), while a dismissal may or may not do so. Where a midtrial dismissal is granted on the ground, correct or not, that the defendant simply cannot be convicted of the offense charged, Jenkins establishes that further prosecution is barred by the Double Jeopardy Clause. 45 U.S.L.W. at 4663.

In this case, the proceedings of May 7th, 1976 "terminated in [Appellants] favor." As Judge Curtin put it: "This ends the litigation in this particular case." (App 28) Clearly all parties regarded the proceedings as concluded on that indictment, even though, as demonstrated above (Subpoint B and C) the Government's motion and the Court's order were based on the erroneous premise that the indictment was invalid.

"The critical question is," within the Court's decisions in Jenkins and Lee, "whether the order contemplated an end to all prosecution of the defendant for the offense charged." 45 U.S.L.W. at 4663. At the least, it is not a mistrial ruling resting "on grounds consistent with reprosecution."

Although the defendants joined in the motion for dismissal of the indictment, no consent to another trial can be implied from that motion. When a defendant consents to a mistrial, he is implicitly consenting to a retrial of the case: the indictment still stands, the defendant remains on bail or incarcerated, and the case is still very much alive. But when, as here, the motion joined in by the defendant was for a dismissal of the indictment, no consent to run the gantlet again may be implied. The indictment is gone, the defendant's bail is exonerated, and the case has passed into history. And here, it is clear from the transcript of the May 7 proceedings that all rights were reserved, making clear beyond peradventure that no consent to another trial may be implied from those proceedings.¹⁶

It is true that the Government purported to "reserve on its rights to seek a reindictment" (App. 27)¹⁷, but it is equally true that defense counsel, in light of the double jeopardy problems the case obviously presented, reserved "all rights to move against any future

¹⁶ For the same reasons, if the Court's order of May 7 were deemed a mistrial, the doctrine that the double jeopardy clause is not offended by retrial after a mistrial requested or consented to by the defendant, see United States v. Dinitz, *supra.*, would not apply, as no consent to retrial can be implied in the circumstances.

¹⁷ Whether the Government may validly do this is the central question on this appeal. The Government, of course, may not "reserve" rights denied it under the double jeopardy clause.

indictment" (App. 28). This does not indicate consent to a reindictment; it is rather a pledge to resist it on double jeopardy grounds. The District Court's statements of May 7th do not take sides or otherwise make clear whether the court believed the matter was at an end, but rather reserved judgment until such time as the double jeopardy motion was presented.

We submit that under Jenkins, the May 7th order was not a mistrial. Rather, the order of dismissal, granted "on the grounds, correct or not, that the defendants simply cannot be convicted of the offense charged" United States v. Lee, U.S. , 45 U.S.L.W. at 4663, ends the case, because any other result would require "further proceedings...devoted to the resolution of factual issues going to the elements of the offense charged." 420 U.S. at 370.

Second, even were the District Court's order deemed a mistrial, Sommerville would not control. In Sommerville, the Court applied the test, derived from United States v. Perez, 9 Wheat. (22 U.S.) 579 (1824), whether the mistrial was dictated by "manifest necessity" or the "ends of public justice", 410 U.S. at 461 and passim, to a fact situation in which it was clear that no conviction upon the defective indictment could be upheld. The Supreme Court's decision expressly turned on that finding:

A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of public justice" to require that the government proceed with its proof, when, if it succeeded before the jury, it would automatically be stripped of that success by an Appellate Court. 410 U.S. at 464.

Here, by contrast, the original indictment was valid, even though inartfully drawn and even though it makes reference to the wrong statute (see Subpoint C, above.) and the Government would not have been "automatically stripped of" its victory; there was therefore no "manifest necessity" for the mistrial. Thus, even were the court's action of May 7, 1976 deemed a mistrial, Sommerville would be inapposite.

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court reverse the Order of the District Court and remand with instructions that the superseding indictment be dismissed, or, in the alternative, remand with instructions that the conspiracy count of the superseding indictment be dismissed.

Respectfully submitted:

Dated: Buffalo, New York
June 17, 1977

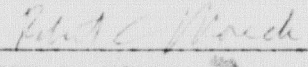
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CERTIFICATION

This is to certify that I served two copies of the enclosed brief on appeal and one copy of the enclosed joint appendix on Richard J. Arcara, Esq., United States Attorney, United States Courthouse, Buffalo, New York, 14202, Attention Roger P. Williams, Esq., Assistant United States Attorney by placing the same in a fully post paid envelope in the United States Post Office depository.



ROBERT C. MACEK

Dated: June 20, 1977

